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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2134

In Re: Exterior Siding and Aluminum Coil Antitrust Litigation (MDL 454)

ALSIDE, INC., et al.,

Petitioners,

VS.

THE HONORABLE CHARLES R. WEINER, Judge, United States District Court, Sitting by Designation in the District of Minnesota,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES INVOLVED

Although the Honorable Charles R. Weiner is designated as the respondent in the Petition for Writ of Certiorari, the real parties in interest, on whose behalf this brief in opposition is submitted, are the plaintiffs Hoyt Construction Company, Inc., Minnesota Exteriors, Inc., Western Builders, Inc., Lagar Construction Company, Midwest Builders & Materials, Inc., and Riverside Builders, Inc.

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Plaintiffs respectfully request this Court to deny the Petition for a Writ of Certiorari for the reasons set forth below.

COUNTERSTATEMENT OF THE CASE

Petitioners are defendants in the multidistrict *Aluminum Siding Antitrust Litigation*, M.D.L. 454. By their Petition, they seek to overturn a decision of the Eighth Circuit sitting *en banc* refusing to issue a writ of mandamus to compel a transferee district court judge to vacate an order certifying a class.[1]

[1] For a chronology of events, see the Procedural History, Appendix A.

M.D.L. 454 consists of four price-fixing antitrust class actions filed by six named plaintiffs in the United States District Courts for the District of Minnesota, the Northern District of Illinois, and the Northern District of California.[2] Plaintiffs have alleged that, over a period of many years, the defendants monopolized and conspired to raise, fix, maintain or stabilize the price of aluminum siding and coil throughout the United States in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

The first action was filed by plaintiffs Hoyt Construction Company, Inc. (Hoyt) and Minnesota Exteriors, Inc. (MEI) in 1975 in the District of Minnesota. The district court (Alsop, J.) denied plaintiffs' request for class certification, concluding that plaintiffs were limited to the Minneapolis/St. Paul area and that the interests of Hoyt and MEI were not sufficient to ensure vigorous prosecution of the claims. (Memorandum Opinions, August 24, 1978, January 21, 1980, and February 8, 1980, Petition, Appendices A-D).

In 1980, plaintiffs Western Builders, Inc. (Western) and Lagar Construction Company (Lagar) filed an action in the Northern District of California and plaintiff Midwest Builders and Materials, Inc. (Midwest) filed an action in the Northern District of Illinois. These cases were also filed as class actions against the defendants named by Hoyt and MEI.

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[2] *Hoyt Construction Company, Inc., et al.* v. *Alside, Inc.*, District of Minnesota, Fourth Division, Civil Action No. 4-75-257; *Western Builders, Inc., et al.* v. *Alside, Inc., et al.*, Northern District of California, Civil Action No. 80 C 4400; *Midwest Builders and Materials* v. *Alside, Inc., et al.*, Northern District of Illinois, Eastern Division, Civil Action No. 80 C 6804; *Riverside Builders, Inc.* v. *Alside, et al.*, Northern District of Illinois, Eastern Division, Civil Action No. 82 C 1027.

In January, 1981, defendants filed a motion before the Judicial Panel on Multidistrict Litigation to consolidate the pending cases pursuant to 28 U.S.C. § 1407.[3] This motion was filed prior to the filing of any motion for class certification by Western, Lagar or Midwest. The Panel found that the actions involved common questions of fact and transferred the *Western, Lagar* and *Midwest* cases to the District of Minnesota for consolidated or coordinated pretrial proceedings with the *Hoyt* and *MEI case*. The judge appointed to sit by designation, the Honorable Charles R. Weiner, had previously been appointed to sit as a district judge in the District of Minnesota (Appendix B).[4]

After transfer of the cases, all plaintiffs filed a joint motion for class certification with Judge Weiner. Judge Weiner ordered the parties to file supplemental briefs on the class certification issue by July 20, 1981. A pretrial conference with all parties represented was held prior to the due date for the briefs and none of the defendants requested an extension of time to file.

On July 20, 1981, plaintiffs timely filed their supplemental class brief, a revised affidavit of their economist, and exhibits (Appendix C). Defendants, however, did not file

[3] The Petition, at page 5, incorrectly states that "the parties" moved for multidistrict consolidation.

[4] Judge Weiner is experienced in class action matters and has both granted and denied class certification in the following published cases: *In re Exterior Siding and Aluminum Coil Antitrust Litigation*, 538 F.Supp. 45 (D.C. Minn. 1982) (granted); *In re Caesars Palace Securities Litigation*, 360 F.Supp. 366 (S.D.N.Y. 1973) (granted); *Swarb* v. *Lennox*, 314 F.Supp. 1091 (E.D.Pa. 1970) (granted); *District Council of the Port of Philadelphia* v. *Seatrain Lines, Inc.*, 377 F.Supp. 1278 (E.D. Pa. 1973) (denied); *Alexander* v. *Gino's, Inc.*, 21 Fair Empl. Prac. Cas. (BNA) 183 (E.D.Pa. 1979), *aff'd*, 621 F.2d 71 (3d Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (denied); *Hackett* v. *General Host Corp., et al.* 1972 Trade Cas. (CCH) ¶ 73,879 (E.D.Pa. 1970) (denied).

any brief, affidavit or exhibits. On August 3, 1981, Judge Weiner entered an order certifying the class.[5]

Plaintiffs' papers presented Judge Weiner with changed facts and law. For example, the filing of three new cases with four new corporate plaintiffs from various parts of the United States had resolved Judge Alsop's earlier concerns regarding the typicality and adequacy of the class representatives (8th Cir. Opinion of December 29, 1982, dissent of Arnold, J., Petition, Appendix, H-17). Moreover, the Panel, in consolidating the cases, had found that there were common issues of fact. Finally, subsequent to Judge Alsop's rulings, several significant national antitrust class action decisions were issued granting certification in circumstances similar to this case.[6]

After the entry of the order certifying the class, defendants filed a motion to vacate the class certification order or, alternatively, for certification pursuant to 28 U.S.C. § 1292 (b). While this motion was being briefed, defendants filed a petition for a writ of mandamus. After full briefing and oral argument, defendants' motion was denied by memorandum order of January 5, 1982. (Petition, Appendix G).

[5] Defendants complain that the class action order was entered without benefit of briefing by them (Petition, 4). This only occurred because defendants failed to file their papers when due.

[6] The new cases cited to Judge Weiner by plaintiffs included: *In Re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex. 1978); *In Re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979); *In Re Glassine and Greaseproof Paper Antitrust Litigation*, 88 F.R.D. 302 (E.D. Pa. 1980); *Hedges Enterprises, Inc.* v. *Continental Group, Inc.*, 81 F.R.D. 461 (E.D. Pa. 1979); *Impervious Paint Industries* v. *Ashland Oil Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,138 (W.D. Ky. 1980); *In Re Cement and Concrete Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,502 (D. Ariz. 1979).

In January, 1982, defendants filed a second petition for mandamus.[7] A panel of the Eighth Circuit granted the writ by a two-to-one decision. Judge Arnold dissented, and in a detailed opinion, stated that the majority, in granting mandamus, had opened "too wide a hole in the final-judgment rule", contrary to controlling precedents of this Court and earlier decisions of the Eighth Circuit. Judge Arnold also stated that the majority had misapplied the "law of the case" doctrine in that there never had been a class certification ruling in the three new consolidated cases. (Petition, Appendix, H-12 and H-16).

In January, 1983, plaintiffs filed their petition for a rehearing *en banc*. In February, 1983, the full court of appeals granted the petition, vacated the decision of the panel, and set the mandamus petition for rehearing. On March 28, 1983, after oral argument, the writ of mandamus was denied by an equally divided court. (Petition, Appendix I).

REASONS FOR DENYING THE WRIT

The Petition does not meet the standards of Rule 17 of this Court. Defendants have failed to show that the Eighth Circuit's decision conflicts with the decisions of this Court or any court of appeals, that the Eighth Circuit departed from the normal course of judicial proceedings, or that the Petition raises an important question of federal law which this Court has not previously decided but should. Further, the Petition ignores the legislative and judicial policy against appellate review of non-final orders, which policy itself presents a controlling reason to deny the writ.

The Court of Appeals did nothing more than exercise its discretion not to issue a writ of mandamus to compel the

[7] The first petition was voluntarily dismissed by defendants after Judge Weiner set defendants' motion for argument. After the second petition was filed, the Panel also transferred *Riverside Builders, Inc.* v. *Alside, et al.*, Northern District of Illinois, Civil Action No. 82 C 1027 (Riverside), to the District of Minnesota.

district court to vacate a class certification order. Similarly, the district court did nothing more than exercise *its* discretion to certify a class on the basis of the record before it at the time of certification, which was well within its judicial power under Rule 23. The class certification order did not constitute a usurpation of judicial power by the district court warranting a writ of mandamus, and the Eighth Circuit did not abuse its discretion in refusing to issue a writ. Neither of these discretionary rulings merit review by this Court.

Nor does the fact that Judge Weiner was a transferee judge in a multidistrict case lend any significance to an otherwise routine class certification order. Judge Weiner's refusal to follow Judge Alsop's earlier order denying certification presents no meaningful issue regarding the "law of the case" doctrine. Judge Weiner had new facts, new law and, most importantly, three new cases before him which were not even filed when Judge Alsop denied certification. The doctrine of "law of the case" was neither breached nor applicable.

I

THE DENIAL OF THE WRIT OF MANDAMUS IS IN ACCORD WITH THE LAW OF THIS COURT AND IS NOT IN CONFLICT WITH THE LAW OF ANY OTHER CIRCUIT

A. Congress and This Court Have Established A Policy Against Appellate Review of Non-Final Orders

Defendants seek review of the court of appeals' refusal to issue a writ of mandamus requiring a district court judge to vacate a discretionary order of class certification. Issuance of a writ to review this routine discretionary ruling is unnecessary, would open a wide hole in the final judgment rule, 28 U.S.C. § 1291, and would invite litigants

dissatisfied with class action rulings to pursue piecemeal appeals contrary to established legislative and judicial policy. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 471 (1978); *Allied Chemical Corp.* v. *Daiflon, Inc.* 449 U.S. 33, 36 (1980).

Congress has mandated that appellate review should occur only after final judgment. *Allied Chemical, supra,* at 35. This Court has ruled that "[o]rders relating to class certification are not independently appealable under § 1291 prior to judgment." *Coopers & Lybrand, supra* at 470. This finality requirement "prevents the debilitating effect on judicial administration" caused by piecemeal appeals in the same case.[8] *Coopers & Lybrand, supra* at 471, 473.

Since *Coopers & Lybrand,* this Court has reaffirmed that appellate review of class certification orders is inappropriate because they are "inherently tentative". *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S.Ct. 927, 935, n.14 (1983). Class certification orders are entered at the initial stage of a case, often before all of the facts and parties have been fully defined, and Rule 23(c)(1) accordingly provides that such orders may be modified prior to final judgment. The tentativeness of such orders is particularly appropriate in multidistrict litigation where there are multiple plaintiffs, complex facts, and the consolidation of related cases.

Issuance of a writ of mandamus to control class certification would deprive a district court of the discretion granted it under Rule 23(c)(1) to alter or amend certification orders as the litigation develops. To sanction review of such orders by mandamus would relegate the final judgment rule

[8] This case is a prime example of the undesirability of piecemeal appeals and the consequent burden on the judiciary. Defendants have already filed two mandamus petitions with the Eighth Circuit seeking to overturn the class certification order.

to "the mercy of any court of appeals which [chooses] to disregard it." *Allied Chemical, supra* at 36. It would also substitute the discretion of the courts of appeals for that of the trial courts, *Coopers & Lybrand, supra* at 474, n.24, 476, n.28, and nullify the requirements of 28 U.S.C. § 1292(b). Appellate courts would be "thrust into the trial process", *Coopers & Lybrand, supra* at 476, "with the district courts as litigants", *Allied Chemical, supra* at 35, and the intended efficiency of multidistrict litigation and the finality requirement of Section 1291 would be completely undermined.

B. No Special Standard Is Necessary For the Law of The Case Doctrine in Multidistrict Litigation

Lacking an issue of true importance, defendants urge this Court to set a special standard to relieve the supposed "tension" between the "law of the case" doctrine and the powers of a transferee judge in a multidistrict proceeding. Absent the creation of such a standard, defendants contend, there is a potential for gross misuse and abuse of multidistrict proceedings.

Defendants are requesting the creation of a special standard to solve a non-existent problem. Out of approximately 500 multidistrict cases filed, not one has demonstrated the need for such a standard. Indeed, in the few multidistrict cases cited by defendants, the courts easily disposed of the issues before them without concern for tension or potential abuse.

Transferee courts in multidistrict litigation routinely decide class certification, discovery, and similar interlocutory matters. These decisions are necessarily discretionary and depend on the factual record before the court at the time of its ruling. Rulings on such issues require no special standard as suggested by defendants.

The power of a transferee judge to review and revise discretionary discovery orders of the transferor court was clearly recognized in *In Re The Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1981) and *In Re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 676 (D.C. Cir. 1981).

Similarly, the transferee judge is empowered to determine the class action questions because *all* of the parties, claims, and defenses are before him in one proceeding. As stated in *In Re Plumbing Fixture Cases*, 298 F.Supp. 484, 493 and 496 (JPML 1968):

> It is the clear intent of Section 1407 to invest the transferee court with the exclusive powers, after transfer, to make the pretrial determinations of the class action questions. In the similar protection devices litigation we said: "Determination of all matters involving questions of class action shall be left to the sound judgment of . . . the transferee judge . . . ."
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> • • •
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> In the case of class action determinations made by the transferor court prior to transfer, the provisions of Rule 23 apply permitting the transferee court to determine the class action questions and to review and revise the class action order as in its sound judicial discretion is desirable or necessary in the interest of justice.

See also State of Illinois v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 492 (N.D. Ill. 1969).

Moreover, there has been no breach of the "law of the case" doctrine in this situation. Judge Weiner's decision to certify the class was based on a record of changed law and facts which was not before Judge Alsop. Judge Weiner was presented with additional class representatives providing broader geographic representation and additional materials, as well as several new decisions supporting certification.

Judge Weiner also had before him new cases which were not subject to Judge Alsop's prior order. Judge Arnold aptly recognized that the "law of the case" doctrine is inapplicable to these new cases:

> The court, though conceding that the doctrine of "law of the case" may not be an inflexible command, invokes the doctrine to support its reasoning. To this I reply: "the law of *what* case?" Judge Alsop's decision might indeed be the law of the case brought in Minnesota by Hoyt Construction Co. and Minnesota Exteriors, Inc., but how can it be the law of the cases later brought by Western Builders, Inc., and Lagar Construction Co. in California, by Midwest Builders & Materials, in Illinois, and by Riverside Builders, the last case having been filed while this petition was pending before us? None of these later filing plaintiffs was before Judge Alsop; none of them had a chance to argue before him that a class should be certified; yet all seem to be concluded by his ruling. . . .
>
> Surely the view that the filing of three new actions in far away states by four new corporate plaintiffs justifies a new look at the class question, is not so unreasonable as to be a "usurpation of power." . . . (Petition, Appendix, H-16—H-17)

Defendants contend that there is no standard for applying the law of the case doctrine in multidistrict litigation. There is a standard, but it is not the rigid one that defendants wish to impose. Class action decisions by a transferee judge necessarily must be on a case-by-case basis. The standard that the transferee judge applies is to consider the transferor judge's prior rulings, and then make his own decision in light of the post-consolidation circumstances. Judge Weiner's decision not to follow a court's refusal to certify was not a usurpation of power; nor was it even unique. *See, e.g., State of Illinois* v. *Harper & Row Publishers, Inc., supra; Plumbing Fixtures Antitrust Litigation, supra;* and *Plywood Antitrust Litigation,* M.D.L. 159.

The cases cited by defendants as "appropriate cases" (Petition, 8-9) in support of the application of the "law of the case" doctrine are not on point. *Hayman Cash Register Co.* v. *Sarokin*, 669 F.2d 162 (3d Cir. 1982) involved the power of a district court to retransfer a case to its original forum after a transfer pursuant to 28 U.S.C. § 1406(a), not the power to modify a class certification decision. Such transfer orders are not "inherently tentative", and are by nature subject to the principles of comity. *Otten* v. *Stonewall Insurance Co.*, 538 F.2d 210 (8th Cir. 1976) also did not involve a class certification decision. In *Otten*, a decision on a former appeal (concerning the sufficiency of the evidence on a motion for judgment notwithstanding the verdict) was held to conclusively determine the same question when presented in a second appeal. Finally, *ACF Industries, Inc.* v. *Guinn*, 384 F.2d 15 (5th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968), as stated at page 13, note 12, *infra*, did not involve a class certification decision, but a stay order.

Sley v. *Jamaica Water & Utilities, Inc.*, 77 F.R.D. 391 (E.D.Pa. 1977) and *Kramer* v. *Scientific Control Corp.*, 67 F.R.D. 98 (E.D.Pa. 1975), *appeal dismissed in part, reversed in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom, Arthur Andersen & Co.* v. *Kramer*, 429 U.S. 830 (1976) (Petition, 9) are also inapposite. Neither was a multidistrict case and thus did not raise the issues raised by defendants here.[9]

[9] In *Sley*, on the "eve of trial" and six years after the order of class certification, the defendants attempted to decertify the class based on the alleged conflict of interest of plaintiffs' counsel. Since the court was not convinced that the conflict in fact existed, it refused to decertify the class. In *Sley*, the court did in fact recognize that it had the power to change a certification ruling but did not find the alleged conflict of interest an appropriate basis to do so. In *Kramer*, the court denied defendants' motion for reconsideration of class certification on the basis that the alleged grounds for decertification could have been asserted earlier but were not. The "law of the case" doctrine was not even mentioned.

The "tension" between the "law of the case" doctrine and the responsibilities of a multidistrict transferee judge simply does not exist. To grant review of the ruling of the Eighth Circuit denying defendants' latest request for a writ of mandamus would only encourage other litigants dissatisfied with a district court's class certification order to burden the appellate courts with similar petitions.

C. Denial of The Writ of Mandamus In This Case Was Proper

Mandamus is a drastic remedy, to be invoked only in extraordinary situations. This Court has held that "[o]nly exceptional circumstances, amounting to a *judicial usurpation of power,* will justify the invocation of this extraordinary remedy." *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. 33, 35 (1980) (emphasis added). This Court has similarly stated that mandamus should be used *"only* 'to confine an inferior court to a *lawful exercise* of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Id.* at 35, (emphasis added), quoting *Will* v. *United States,* 389 U.S. 90, 95 (1967) and *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26 (1943).

The Petition does not present any exceptional circumstances. The judicial usurpation of power required by *Allied Chemical* is notably absent. Judge Weiner did nothing more than exercise his discretion under Rule 23. Judge Weiner was not obligated to follow Judge Alsop's class ruling, but only to consider it (which he did) in his review. *In Re The Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation, supra* at 118-120. In certifying the class, he acted within the mandate of the Panel, the authority conferred by Rule 23, and well established law.

Nor was Judge Weiner's certification of a class after Judge Alsop had refused to do so an abdication of his judi-

cial function warranting the issuance of a supervisory writ under *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 297 (1957) (cited in Petition, 14).[10] The "supervisory" mandamus in *La Buy* applied to a situation where the district court judge had deprived litigants of a trial by the court in persistent disregard of the directive of the court of appeals.[11] Here Judge Weiner did not ignore an appellate court's order. He merely exercised the authority conferred upon him as the transferee judge.[12] Significantly, defendants have ignored other cases holding mandamus inappropriate to review class certification orders. *See, e.g., In Re Alleghany Corp.*, 634 F.2d 1148 (8th Cir. 1980); *J. H. Cohn & Co.* v. *American Appraisal Associates*, 628 F.2d 994 (7th Cir. 1980) (specifically declining to apply the *La Buy* supervisory writ); *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977) specifically declining to apply

[10] In *La Buy*, a writ was issued because the trial judge's reference of a trial to a master was a *clear abuse* of discretion and ignored the admonition of the Seventh Circuit against such references. Thus the mandamus was based on the policy of preventing a judge from persistently disregarding the rules and warnings of the appellate court and avoiding his judicial duties.

[11] In *United States* v. *Haley*, 371 U.S. 18 (1962) and *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959) *cert. denied*, 362 U.S. 950 (1960) (cited in Petition 15), as in *La Buy*, the writs were issued because the district courts entered orders contradicting express directives from courts of appeals.

[12] *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S.Ct. 927 (1983) (Petition, p. 14) was not a mandamus case and actually supports plaintiffs' position. In that case, this Court reaffirmed *Coopers* and the inherently tentative nature of class certification orders. *ACF Industries, Inc.* v. *Guinn*, 384 F.2d 15 (5th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968) (cited at Petition, 13), was not a class action case and has no application here in light of this Court's rulings in *Coopers* and *Moses*. In *ACF*, the writ was issued to protect the permanent nature of a stay order. In this case, however, mandamus would destroy the inherently tentative nature of a class certification order.

the *La Buy* supervisory writ); *Interpace Corp.* v. *City of Philadelphia*, 438 F.2d 401 (3d Cir. 1971).[13]

II

AN EQUALLY DIVIDED VOTE BY A FEDERAL COURT OF APPEALS SITTING EN BANC AFFIRMS THE DISTRICT COURT RULING

A. The Eighth Circuit Practice Is To Affirm The Judgment of the District Court

The Eighth Circuit has a long-established practice affirming the district court when the court of appeals sitting *en banc* is equally divided. *Tinker* v. *Des Moines Independent Community School District*, 383 F.2d 988 (8th Cir. 1967). The existence of this practice is sanctioned under Rule 47 of the Federal Rules of Appellate Procedure. Given the longevity of the practice, defendants cannot claim surprise (Petition, 20).

B. The Practice of Other Courts of Appeals Is To Affirm a Lower Court Judgment With an Equally Divided En Banc Ruling

The Eighth Circuit practice regarding the effect of equally divided *en banc* decisions conforms to that of other courts of appeal. Contrary to defendants' claim of "confusion and uncertainty" (Petition, 19), it is well established

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[13] *McDonnell Douglas Corp.* v. *U.S. District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied sub nom. Flanagan* v. *McDonnell Douglas Corp.*, 425 U.S. 911 (1976) and *Schmidt* v. *Fuller Brush Co.*, 527 F.2d 532, (8th Cir. 1975), (cited in Petition, 15) are also factually inapplicable to this case. In both, the appellate courts issued writs because the district courts had improperly applied the Federal Rules in granting class certification. In *McDonnell*, the district court's certification of a class for damages was contrary to Rule 23(b)(2) and a prior Ninth Circuit decision. Similarly, in *Schmidt*, the district court certified a class action in a Fair Labor Standards Act case under Rule 23, in direct disregard of a statute mandating a totally different procedure in such cases.

that lower court judgments are affirmed by equally divided courts of appeals sitting *en banc*.[14] As stated in Vol. 40, New York University Law Review 568, 584 (1965): "The circuits follow the Supreme Court practice of affirming the lower court decision in such instances . . . ." *See Biggers* v. *Tennessee*, 390 U.S. 404 (1968), *rehearing denied*, 390 U.S. 1037 (1968).

None of defendants' cases supports their position. In *Carmichael* v. *Eberle*, 177 U.S. 63 (1900), a territorial appellate court voted 2-1 for a reversal. A motion for a rehearing was denied by a 2-2 divided Court. In *Carmichael* the only issue was whether a rehearing would be granted. The divided court did not address the merits. The case merely states that a majority is needed to grant a rehearing. In this case, however, there is no question that the Eighth Circuit granted a rehearing. *Bishop* v. *Wood*, 498 F.2d 1341 (4th Cir. 1974), *aff'd*, 426 U.S. 341 (1976), is also misinterpreted by defendants and actually supports plaintiffs. In that case, the *en banc* court affirmed the lower court, *not* the panel, in accordance with other precedent in the Fourth Circuit. *See United States* v. *Kimes*, 458 F.2d 36 (4th Cir. 1972); *United States* v. *Mandel*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

[14] *See Drake Bakeries Inc.* v. *Local 50, American Bakery & C. Wkrs.*, 294 F.2d 399, 400 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 254 (1962); *Commonwealth of Penn.* v. *Local Union 542, International Union of Operating Engineers*, 648 F.2d 923, 924 (3d Cir. 1981), *rev'd on other grounds*, 102 S.Ct. 3141 (1982); *United States* v. *Mandel*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States* v. *Geders*, 585 F.2d 1303, 1305-1306 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *Ramsey* v. *United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), *rev'd on other grounds*, 401 U.S. 302 (1971); *United States* v. *Clavey*, 578 F.2d 1219 (7th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978); *Tinker* v. *Des Moines Independent Community School Dist.*, 383 F.2d 988 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 503 (1969).

CONCLUSION

There is no reason for this Court to issue a Writ of Certiorari in this case. The Petition should be denied.

Dated: July 25, 1983

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APPENDIX A

PROCEDURAL HISTORY

June 4, 1975, Plaintiffs Hoyt Construction Company, Inc. (Hoyt) and Minnesota Exteriors, Inc. (MEI) commence antitrust class action in the District of Minnesota.

August 24, 1978, Order denies motion of plaintiffs Hoyt and MEI for class action certification (Alsop, J).

January 21, 1980, Order denies renewed class action motion by Hoyt and MEI (Alsop, J).

February 8, 1980, Order denies plaintiffs (Hoyt and MEI) motion to alter or amend or for relief from Order of January 21, 1980 (Alsop, J).

December 9, 1980, Plaintiffs Western Builders, Inc. (Western) and Lagar Construction Company (Lagar) commence antitrust class action in the Northern District of California.

December 22, 1980, Plaintiff Midwest Builders and Materials, Inc. (Midwest) commences antitrust class action in the Northern District of Illinois.

January 26, 1981, Defendants move the Judicial Panel on Multidistrict Litigation to consolidate and transfer to the District of Minnesota pursuant to 28 U.S.C. § 1407.

April 8, 1981, Order of the Judicial Panel on Multidistrict Litigation transfers litigation to the District of Minnesota and assigns The Honorable Charles R. Weiner, Judge of the United States District Court for the Eastern District of Pennsylvania, to sit by designation.

June 22, 1981, Motion by plaintiffs Hoyt, MEI, Western, Lagar and Midwest for class action certification and other relief.

August 3, 1981, Memorandum and opinion certified class (Weiner, J).

August 18, 1981, Defendants' motion to vacate class action order or for certification pursuant to 28 U.S.C. § 1292(b).

October 16, 1981, Defendants' first petition for writ of mandamus.

October 27, 1981, Defendants' first petition for writ of mandamus voluntarily dismissed.

October 30, 1981, Hearing on defendants' motion to vacate class action or for certification pursuant to 28 U.S.C. § 1292(b) (Weiner, J).

January 5, 1982, Order denies motion to vacate class action order or for certification pursuant to 28 U.S.C. § 1292(b) (Weiner, J).

January 20 1982, Defendants' second petition for writ of mandamus.

February 19, 1982, Riverside Builders, Inc. commences antitrust class action in the Northern District of Illinois.

February 24, 1982, Plaintiffs' answer to petition for writ mandamus.

March 9, 1982, Order of the Judicial Panel on Multidistrict Litigation transfers Riverside Builders case to the District of Minnesota.

December 29, 1982, Opinion, dissent and judgment of Eighth Circuit Court of Appeals.

January 11, 1983, Petition for rehearing *en banc.*

February 11, 1983, Order of Eighth Circuit Court of Appeals grants rehearing *en banc.*

April 28, 1983, Order of Eighth Circuit Court of Appeals sitting *en banc* denies petition for writ of mandamus.

APPENDIX B

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER CIRCUIT

The Chief Judge of the Eighth Circuit having certified that there is a necessity for the assignment of a judge from another circuit to perform the duties of district judge and hold a district court in the District of Minnesota; and the Chief Judge of the Third Circuit having consented to the designation and assignment of the Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, in that Circuit, to hold the District Court in the District of Minnesota during the period beginning September 1, 1975, and ending September 1, 1976, now, therefore, pursuant to the authority vested in me by Title 28, United States Code, Section 292(d), I do hereby designate and assign the said Charles R. Weiner to perform the duties of district judge and hold a district court in the District of Minnesota during the period beginning September 1, 1975, and ending September 1, 1976, and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated: Washington, D.C., September 8, 1975.

APPENDIX C

COCHRANE & BRESNAHAN, P.A.
Attorneys at Law
Suite 500
360 Wabasha Street
Saint Paul, Minnesota 55102

July 20, 1981

The Honorable Charles R. Weiner
Judge of the U.S. District Court
6613 South U.S. Courthouse
Independence Mall West
Philadelphia, Pennsylvania 19106

Re: Aluminum Siding and Coil Antitrust Litigation
MDL 454

Dear Judge Weiner:

We enclose herewith Plaintiffs' Joint Brief in Support of Motion for Class Action Determination together with an Affidavit in Support thereof. Also enclosed is a copy of the materials distributed by U.S. Steel/Alside which graphically describe the products which are the subject of this litigation and the manner in which they are produced and applied.

Very truly yours,

John A. Cochrane

JAC:mm
Enclosure
cc: All counsel[1]

[1] Note to Counsel: Because of the volume of paper, a reproduction of the U.S. Steel/Alside materials are being sent only to lead counsel for each defendant.